

SUBJECT: Authorizing use of in-house counsel by State Securities Board

COMMITTEE: Investments and Banking — favorable, without amendment

VOTE: 11 ayes — Marchant, Hudson, Carona, Giddings, Gutierrez, Haggerty, McCoulskey, Patterson, Price, Romo, D. Smith

0 nays

SENATE VOTE: On final passage, February 18 — voice vote

WITNESSES: For — (Registered only — Mary Alice Lapham, Fulbright & Jaworski; Caroline LeGette, Thompson & Knight; Polly Powell, Baker & Botts; Alan Bromberg; Roy W. Mouer; Sue B. Roberts)

Against — None

On — (Registered only — Richard Latham, State Securities Board)

BACKGROUND: Article 5 of SB 3, by Montford et al. (72nd Legislature, first called session) directed the Office of the Attorney General (OAG) to consolidate within the office most legal services for executive branch agencies by September 1, 1992. Article 5 specifically exempted from consolidation almost two dozen state agencies and organizational entities, ranging from the Governor's Office and other agencies directed by elected or appointed officials to the departments of public safety, parks and wildlife and insurance.

DIGEST: SB 118 would include the State Securities Board in the list of agencies exempt from the consolidation of legal services under the Office of the Attorney General.

SUPPORTERS SAY: The specialized work performed by the securities board justifies allowing it to retain its own in-house counsel. The board oversees compliance with particularly complex state and federal laws and regulations, requiring the expertise of attorneys with specialized training. The board is regulation-driven; fully one-fourth of its staff — 18 employees — are attorneys. Allowing this exemption would not be granting any special privilege but simply would recognize a justifiable need.

The sheer volume of work handled by the securities board requires an on-site and dedicated staff of attorneys. In 1991 \$190 *billion* worth of securities were registered in Texas. The state must continue to ensure that the business community is able to expeditiously generate capital through stock offerings while it protects the interests of investors, and in-house counsel with specialized expertise are essentially to performing that duty.

Article 5 of SB 3 gave the Office of the Attorney General (OAG) discretionary authority to consolidate legal services when savings in time and money could be achieved; it was not a legislative mandate for universal consolidation. If the Legislature had intended complete consolidation, it would not have exempted any agencies. This bill merely recognizes that the securities board, like the agencies originally exempted, serves special functions requiring its own in-house counsel.

Exempting the securities board from consolidation would not open the floodgates for exemption attempts by other agencies. The Legislature has the discretion to make exemptions on a case-by-case basis, when reasonable in order to accommodate special circumstances.

OPPONENTS
SAY:

The Office of the Attorney General already has denied the Securities Board's request for exemption, as well as those of dozens of other agencies; this bill would attempt an end run around that decision. According to the OAG's December 1992 report on the status of Article 5 implementation, "each agency subject to the in-house counsel provisions of Article 5 considers itself to be unique, and almost every agency has requested an exemption even though its functions and legal needs in most cases are similar to those of other functionally similar agencies."

So far, only nine eligible agencies, primarily those already making extensive use of outside counsel, have acquiesced to consolidation of their legal counsel. In a September 1 update on consolidation efforts, the OAG reported that "a number of agencies have already informed us that they will not cooperate with our program . . . explicitly or implicitly, the agencies feel that by delaying implementation into the next regular session of the legislature, they will be successful in obtaining legislative relief from SB 3." SB 118 is only the first of what could be many attempts by agencies seeking special treatment.

Consolidation of state legal services within the OAG was a cost-saving recommendation of the 1991 *Breaking the Mold* report issued by the Texas Performance Review. An overly decentralized system makes it difficult for attorneys employed by various state agencies to take a consistent legal position on behalf of the state. Legal libraries and computerized legal research services are needlessly duplicated when each agency has its own set of lawyers.

The consolidation plan devised by the OAG ensures both continuity and efficiency of services: current staff attorneys would remain on-site, providing their usual services, while gradually assuming responsibility for representing their client in specialized areas previously reserved for the OAG, including administrative appeals, rulemaking challenges and declaratory judgment actions in district and appellate court. Eventually, under the space consolidation plan of the General Services Commission, counsel for functionally similar agencies would be located in OAG "satellite" legal offices within the office complexes of the agencies they serve.

The OAG plan provides sufficient flexibility for the securities board and other regulatory agencies to have direct access to legal counsel with the required expertise. But allowing agencies to circumvent Article 5 piecemeal, with each retaining separate, duplicative corps of attorneys, is an unnecessary luxury that the state can no longer afford.

NOTES:

Other bills filed that would exempt agencies from consolidation of legal services under the OAG include HB 1501 by Naishtat (the Texas School for the Deaf and the Texas School for the Blind and Visually Impaired), SB 519 by C. Harris (the Texas Alcoholic Beverage Commission) and SB 626 by Sibley (the Texas National Research Laboratory Commission).